IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2004-CA-02218-COA

MICHAEL MORRIS AND CLAIRE MORRIS **APPELLANTS**

v.

FORD MOTOR COMPANY, TEXAS INSTRUMENTS INCORPORATED, AND TOM WIMBERLY AUTO WORLD INCORPORATED **APPELLEES**

DATE OF JUDGMENT:	9/10/2004
TRIAL JUDGE:	HON. WILLIAM E. CHAPMAN, III
COURT FROM WHICH APPEALED:	MADISON COUNTY CIRCUIT COURT
ATTORNEYS FOR APPELLANTS:	MICHAEL S. ALLRED KATHLEEN H. EILER
ATTORNEYS FOR APPELLEES:	ALAN LEE SMITH WALKER (BILL) JONES BARRY W. FORD STEPHEN WALKER BURROW
NATURE OF THE CASE:	CIVIL - PERSONAL INJURY
TRIAL COURT DISPOSITION:	SUMMARY JUDGMENT GRANTED.
DISPOSITION:	AFFIRMED – 08/08/2006
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

BEFORE KING, C.J., IRVING, CHANDLER AND ISHEE, JJ.

IRVING, J., FOR THE COURT:

¶1. Michael Morris and Claire Morris (the Morrises), husband and wife, sued Ford Motor Company (Ford), Texas Instruments, Inc. (TI), and Tom Wimberly Auto World, Inc. (Wimberly)[1] after a malfunction

[1]For clarity of understanding, the Defendants in the court below will be referred to in the collective as "the Appellees" except in direct quotations. In such instances, the name designation employed by the author of the quotation will be utilized.

in the Morrises' Lincoln Town Car allegedly caused the car to catch on fire, resulting in the burning of their home. After discovery, Ford filed a motion for summary judgment which the Madison County Circuit Court granted "on behalf of all Appellees." The Morrises appeal and contend that summary judgment is not proper when "Defendants have engaged in acts of negligence and Plaintiffs have suffered severe and substantial mental and emotional distress as a result."

¶2. Finding no error, we affirm.

FACTS

¶3. On February 23, 1999, Claire parked her 1993 Lincoln Town Car in her garage and went inside her house. Shortly thereafter, while the vehicle was parked and turned off, the Towncar caught fire. The fire spread to other parts of the garage and destroyed the Morrises' second car. The fire also spread into the kitchen and living room of the house. After she became aware of the fire, Claire went outside and watched as her house burned. The smoke damage throughout the house was extensive, and the Morrises were forced to vacate their home for several months after the fire.

¶4. All the experts who were asked to analyze the cause of the fire agreed that the Towncar was the probable source of the fire. The experts found that the most likely cause of the fire was a defective speed control deactivation switch, which probably overheated and ignited. The Morrises' insurance company paid for the damage to their home and possessions.[2] Claire's medical records indicate that she suffered from depression and other emotional problems after the fire, and she eventually attempted to commit suicide

[2]The Morrises sued Ford and the other Appellees, seeking compensation for damage to their property and home and contending that their insurance company had failed to adequately compensate them for their loss. Ford contended in its motion for summary judgment that the Morrises could not recover those damages because they had already been paid by the insurance company. The Morrises apparently concede this in their appeal, because they allege only that the summary judgment was improper in regard to emotional and mental damages.

on February 21, 2001. Additional facts, as necessary, will be related in the analysis section of this opinion.

ANALYSIS AND DISCUSSION OF THE ISSUE

Standard of Review

¶5. We apply a *de novo* standard of review to a grant of summary judgment. *Stallworth v. Sanford*, 921 So. 2d 340, 341 (¶5) (Miss. 2006) (citing *Davis v. Hoss*, 869 So. 2d 397, 401 (¶10) (Miss. 2004)). Summary judgment is proper only when "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." *Id.* (quoting M.R.C.P. 56(c)). We review evidence in "the light most favorable to the party opposing the motion." *Id.* (quoting *Davis*, 869 So. 2d at 401 (¶10)). The burden of proving that no genuine issue of material fact exists "is placed on the moving party." *Id.* (citing *Davis*, 869 So. 2d at 401(¶10)).

Propriety of Summary Judgment

¶6. The Morrises claim that the court's grant of summary judgment was in error because the Appellees "engaged in acts of negligence and [they] have suffered severe emotional distress as a result." The Appellees contend that the Morrises cannot recover because Mississippi does not allow for recovery of mental damages arising from a negligent action unless the Morrises are able to show "demonstrative physical harm."

¶7. As recognized by both parties, there are two lines of Mississippi cases addressing the issue of recovery for mental damages in a negligence action. The first line holds that mental damages may only be recovered when there is an accompanying physical harm. *See*, *e.g.*, *Am. Bankers' Ins. Co. of Fla. v. Wells*, 819 So. 2d 1196, 1209 (¶¶43-45) (Miss. 2001). The second line of cases holds that mental

damages may be recovered in a negligence action simply upon a showing that the harm was "reasonably foreseeable." *Adams v. U.S. Homecrafters, Inc.*, 744 So. 2d 736, 744 (¶¶20-21) (Miss. 1999) (quoting *Strickland v. Rossini*, 589 So. 2d 1268, 1275 (Miss. 1991)). The Appellees contend that the first line of cases, as represented by *American Bankers*, is the controlling law in Mississippi. Consequently, the Appellees argue that the Morrises are required to show physical harm to recover for their emotional injuries. The Morrises contend that the second line of cases is applicable, and that they are required only to show that the Appellees' conduct was reasonably foreseeable.

¶8. We decline to attempt to determine which line of cases is the current prevailing law in Mississippi, as that is a task better suited to the Mississippi Supreme Court. We do note, however, the court's language in *American Bankers*: "We have applied the line of cases adopting the more restrictive majority view in the most recent holdings on this issue. . . ." *American Bankers*, 819 So. 2d at 1209 (¶43). As an indication of the confusion surrounding this issue, the court then went on to say: "the cases applying the minority view have not been overruled." *Id.* Since we find other grounds on which summary judgment was properly granted, we need not determine which of the two lines of cases is controlling.

¶9. We find that summary judgment in this case was properly granted, regardless of which line of cases applies, because, in responding to the Appellees' motion for summary judgment, the Morrises failed to show a genuine issue of fact in regards to whether the injuries they suffered were foreseeable to the Appellees. The only evidence offered by the Morrises was a National Highway Transportation Safety Administration (NHTSA) investigation that ultimately led to Ford's issuance of a recall due to the faulty speed control deactivation switch. However, the NHTSA investigation was only begun in October 1998, approximately four months before the Town Car combusted. The investigation was not completed until several months after the fire, at which time Ford issued its recall. No other evidence whatsoever was

presented by the Morrises indicating that any of the Appellees were even aware of a problem with the vehicle. No specific examples were provided demonstrating other instances in which Ford vehicles had spontaneously combusted. No reports were submitted indicating that there was a proven and known problem with the vehicles.

¶10. The elements that a plaintiff is required to prove in a negligence action are well-established: "A plaintiff in a negligence suit must prove by a preponderance of the evidence (1) duty, (2) breach of duty, (3) causation, and (4) injury." *Patterson v. Liberty Assoc's, L.P.*, 910 So. 2d 1014, 1019 (¶14) (Miss. 2004) (citing *Miss. Dep't of Transp. v. Cargile*, 847 So. 2d 258, 262 (¶11) (Miss. 2003)). The *Patterson* court went on to explain that "foreseeability is an essential element of both duty and causation." *Id.* (quoting *Delahoussaye v. Mary Mahoney's, Inc.,* 783 So. 2d 666, 671 (¶13) (Miss. 2001)). Therefore, since the Morrises failed to present a genuine issue of material fact regarding an essential element of their claim, summary judgment was properly granted. *See Williams v. Bennett*, 921 So. 2d 1269, 1272 (¶10) (Miss. 2006) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)); *Gorman-Rupp Co. v. Hall*, 908 So. 2d 749, 757 (¶25) (Miss. 2005) (citing *Galloway v. Travelers Ins. Co.*, 515 So. 2d 678, 684 (Miss. 1987)). Since no genuine issue of material fact was presented regarding foreseeability, no error occurred and summary judgment was properly granted.

¶11. The dissent contends that, in so holding, we are "ambushing" the Morrises, because the Appellees "did not raise the issue of Appellee's prior knowledge of the existence of a product defect in their motion for summary judgment." We respectfully disagree. The record reflects that in their motion for summary judgment, the Appellees incorporated, by reference, the contents of their trial brief which was filed with and in support of the motion. In the trial brief, the Appellees stated: "Plaintiffs make numerous allegations in their Complaint that Ford (and other Defendants) *had actual knowledge of an alleged defect* . . . and

concealed its knowledge of the alleged defects. . . ." (emphasis added). The Appellees at that time even pointed out that "despite the fact that this case has been pending for four years and Plaintiffs have had ample time for discovery, Plaintiffs have not produced, and cannot produce, any evidence to support these allegations [that the Appellees had prior knowledge of the defect]." The Appellees clearly indicated in their brief in support of summary judgment that the question of whether Ford and the other Appellees had prior knowledge of the defect was a necessary element of the Morrises' claim for intentional infliction of emotional distress. Despite being warned in the Appellee's trial brief of their failure to produce any evidence as to Ford's prior knowledge of the defect, the Morrises still did not produce any evidence regarding whether the Appellees knew of the alleged defect.

¶12. The dissent then contends that even if the Appellees did raise the issue of foreseeability, "the record is sufficient to survive a motion for summary judgment." The dissent argues that the record is sufficient to survive summary judgment under either of the previously-discussed lines of cases. However, we do not see how either line of cases provides for recovery in the absence of a showing that the Appellees had some prior knowledge of the defect that caused the fire. Regardless of which line of cases applies, the underlying action that the Morrises must succeed on is a claim of negligence. As we have already discussed, a necessary showing to succeed on a negligence claim is that the harm suffered was foreseeable to the Appellees.[3]

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[3] Although the Morrises focus only on their negligence claims in their appeal brief, we note that they also cannot succeed on a claim of intentional infliction of emotional distress. Intentional infliction of emotional distress requires "malicious, intentional, willful, wanton, grossly careless, indifferent or reckless" behavior on the part of a defendant. *Cmty. Bank*, *Ellisville*, *Miss. v. Courtney*, 884 So. 2d 767, 775 (¶28) (Miss. 2004) (citations omitted). In the absence of a showing that the Appellees were aware of the defect or that the defect was foreseeable, the Appellees' behavior could not have been "malicious, intentional, willful, wanton, grossly careless, indifferent or reckless." Therefore, the Morrises also cannot succeed on a claim of intentional infliction of emotional distress without a showing that the Appellees were aware of the defect or that the defect was foreseeable.

¶13. The dissent claims that we incorrectly focus on the "foreseeability of the defect" instead of the "foreseeability of harm." However, we do not see how these two can be separated in any meaningful way. If the defect was not foreseeable or known to the Appellees, then the harm flowing from the defect also was not foreseeable. The dissent also points out that the Morrises did produce an expert, Steve Shephard, who claimed that the defect in question was foreseeable to the Appellees. However, we note that Shephard's affidavit contains no basis for his statement that "[t]he make and model automobile in question experienced very numerous [sic] fires similar to the one in question between 1992 and 1999." Despite making this statement and then asserting that Ford knew about the defect and did nothing, Shephard points to not even one example of another fire between 1992 and 1999. He cites "[v]arious records of the Office of Defects Investigation and the National Highway Traffic Safety Administration applicable to Ford make and model vehicles" and "[r]ecords of the Center for Automobile Safety applicable to the Lincoln Town Car and other Ford makes and models," but declines to discuss how these documents support his opinion. Shephard's affidavit, while it claims that Ford knew of the defect prior to the NHTSA investigation, provides no support whatsoever for that statement. In fact, the affidavit in question was stricken by the court upon motion from the Appellees. The court specifically found that "[the affidavit does] not contain any testimony that would be admissible evidence at trial." Therefore, Shephard's affidavit cannot serve to create a genuine issue of material fact as to whether the defect was foreseeable to the Appellees.

¶14. **THE JUDGMENT OF THE CIRCUIT COURT OF MADISON COUNTY IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLANTS.**

KING, C.J., LEE, P.J., AND ISHEE, J., CONCUR. SOUTHWICK, J., CONCURS IN RESULT ONLY WITHOUT SEPARATE WRITTEN OPINION. ROBERTS, J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY MYERS, P.J., CHANDLER AND BARNES, JJ. GRIFFIS, J., NOT PARTICIPATING.

ROBERTS, J., DISSENTING:

¶15. With all due respect, it appears that the majority confuses the issues in deciding the case *sub judice*. As I see it, this Court must resolve the issue of whether there was a genuine question of material fact regarding the Morrises' ability to demonstrate a legally cognizable injury. After all, that is the issue that the Appellees raised in their motion for summary judgment. However, in affirming the circuit court's decision to grant the Appellee's motion for summary judgment, the majority states:

> Since we find other grounds on which summary judgment was properly granted, we need not determine which of the two lines of cases is controlling.
>
> We find that summary judgment in this case was properly granted, regardless of which line of cases applies, because the Morrises are utterly unable to show that the injuries they suffered were foreseeable to the Appellees. The only evidence offered by the Morrises is a National Highway Transportation Safety Administration (NHTSA) investigation that ultimately led to Ford's issuance of a recall due to the faulty speed control deactivation switch. However, the NHTSA investigation was only begun in October 1998, approximately four months before the Towncar combusted. The investigation was not completed until several months after the fire, at which time Ford issued its recall. No other evidence whatsoever was presented by the Morrises indicating that any of the Appellees were even aware of a problem with the vehicle. No specific examples were provided demonstrating other instances in which Ford vehicles had spontaneously combusted. No reports were submitted indicating that there was a proven and known problem with the vehicles.

I must dissent for two distinctly separate reasons.

¶16. First, the Appellees did not raise the issue of Appellees' prior knowledge of the existence of a product defect in their motion for summary judgment. Rather, the Appellees claimed that the Morrises could not produce proof of demonstrative harm or that Ford proximately caused the Morrises' emotional injuries. The Morrises never had a chance to rebut that issue or otherwise defend against it. In essence, the majority ambushes the Morrises with an issue where it did not previously exist. The effect deprives the Morrises of notice of the issue and an opportunity to be heard. In my opinion, the majority's affirmance of summary judgment on an issue that was not raised in the circuit court results in a violation of the Morrises' rights to due process.

¶17. Secondly, assuming *arguendo* that the Appellees raised the issue on which the majority relies, it is my opinion that the record is sufficient to survive a motion for summary judgment. The majority apparently concludes that the Morrises' emotional distress injuries were not, legally speaking, foreseeable to the Appellees. Within their motion for summary judgment, the Appellees raise the issue of whether there existed a genuine issue of fact concerning the Morrises' ability to show demonstrable harm. As to when a plaintiff may recover damages for emotional distress in a simple negligence action, there are currently two lines of cases. The first line of cases holds that a plaintiff may only recover damages for emotional distress if he can prove "some sort of physical manifestation of injury or demonstrable physical harm." *Am. Bankers' Ins. Co. of Fla. v. Wells*, 819 So.2d 1196 at (¶¶43-45) (Miss. 2001). A second line of cases, identified as a minority view but never explicitly overruled, holds that a plaintiff may recover damages for emotional distress if he shows that the harm was reasonably foreseeable. *Adams v. U.S. Homecrafters, Inc.*, 744 So.2d 736 (¶¶20-21) (Miss. 1999). This theory of liability, as stated in *Adams*, is an echo of Justice Hawkins' eloquently stated concurring opinion in *Sears, Roebuck & Co. v. Devers*, 405 So.2d 898 (Miss. 1981) (Hawkins, J., concurring). In identifying that damages for infliction of emotional distress as a result of simple negligence was an actionable legal theory, Justice Hawkins stated:

> I concur in the result reached by this opinion. I agree that an act which can only be characterized as one of simple negligence happens to cause transitory emotional or mental disturbance, ephemeral in nature, and requiring no professional help, recovery should not be allowed.
>
> I do not believe the language in any previous opinion should be construed to mean, however, that this Court will never uphold a judgment for serious mental injury alone caused by the negligence of another. Although it might be considered an unnecessarily fine distinction, because it is difficult to conceive of an act causing medically serious mental injuries which does not thereby have some physical consequences as well upon the body, this Court should specifically recognize that mental injury alone, if carrying serious consequences and supported by competent medical evidence, is sufficient to support a claim for damages. If there is a genuine basis of liability due to the negligence of another, the plaintiff should not be denied recovery simply because the assault is only upon the mind

> or nervous system, when the result is a serious, medically cognizable injury. This would not be changing a rule of law, but would be a recognition by this Court of the enormous advance which has been made in the art, science and technology of the diagnosis and treatment of mental and emotional infirmities. This, in my opinion, was the thrust of our holding in *First National Bank v. Langley*, 314 So.2d 324 (Miss.1975), and should be clearly enunciated here.

Id. at 902-03. Justice Hawkins' statement is even more relevant today given the advancements made in the medical community over the past quarter century.

¶18. As to the first line of cases, the record contains sufficient evidence to demonstrate a genuine issue of material fact as to whether Ms. Morris's emotional distress was embodied in the requisite physical manifestation. Ms. Morris sought medical treatment for emotional problems thirty-one (31) days after the fire. She was prescribed several medications for depression, sleeplessness, moodiness, and anxiety. Ms. Morris's depression culminated with a suicide attempt and admission into St. Dominic Hospital. Medical records taken by several medical personnel throughout Ms. Morris's ordeal indicate that her thoughts of suicide and her later attempt to accomplish same were the ultimate result of her witnessing her and her husband's house burning down, which was, according to three expert witnesses, the result of the car's defective electrical components. We are bound to examine the evidence in the light most favorable to the Morrises. *McMillan v. Rodriguez*, 823 So.2d 1173 (¶9) (Miss. 2002). If any doubt exists as to Morris's ability to prove causally related demonstrable harm, that doubt must be resolved in favor of denial of Appellees' summary judgment motion. *Shelton v. American Ins. Co.*, 507 So.2d 894, 896 (Miss.1987) (citing *Brown v. Credit Center, Inc.,* 444 So.2d 358 (Miss. 1983) (other citations omitted).

¶19. As for the second, "minority" line of cases, the record also contains a genuine issue of material fact as to whether Ms. Morris's emotional distress was reasonably foreseeable. While there certainly could be circumstances in which the nexus between the negligent act is so far removed from the harm that results

as to preclude the existence of a genuine issue of material fact, that is not the case here. Surely physical harm is a foreseeable result where a car contains a defective component that causes fires. While it is admittedly less certain that one might suffer emotional distress, it can hardly be said to be unforeseeable. Following the logical steps, it is not abnormal for people to own a car and to have a garage attached to their home. Likewise, it is not abnormal for a car owner to store that car in an attached garage. If a defective component in one's car caused a fire, it is foreseeable that the fire would spread to the home. Surely, at the least, a jury issue exists as to whether or not it is reasonably foreseeable that one may suffer emotional distress damages when she evacuates her burning home and then watches it and her treasured possessions burn.

¶20. It should also be noted that the supreme court has identified the "nature of the incident" giving rise to the alleged emotional distress damages as having some import in this regard. *University of Southern Miss. v. Williams*, 891 So.2d 160 (¶32-33) (Miss. 2004). The *Williams* court noted that the "nature of the incident" is important in two ways. *Id*. at (¶33). First, it is essential in determining the foreseeability of the alleged emotional harm. *Id*. Second, the more outrageous the defendant's conduct, the lower the plaintiff's burden of proving specific harm. *Id*.

¶21. In any event, it appears that the majority does not resolve the case on the issue of foreseeability of harm, but rather on the issue of foreseeability of the defect. That is, the majority concludes that the Morrises' emotional distress injuries were not foreseeable to the Appellees because the Morrises' failed to prove Appellees had notice of the defective speed control deactivation switch. The majority bases its conclusion on the prospect that the Morrises' only evidence on the foreseeability issue was the NHTSA investigation, which began approximately four months before the Morrises' home burned. In my opinion, this is where confusion over the issue surfaces.

¶22. The NHTSA investigation speaks to whether the defect was foreseeable. The Appellees did not claim there was a genuine issue of material fact as to foreseeability of the defect. Even assuming that was the issue, the record demonstrates the existence of a genuine issue of material fact as to whether the defect was foreseeable.

¶23. This focus on foreseeability hints that negligence and negligent infliction of emotional distress were the only theories of liability extended by the Morrises. This was not the case. As to the specific claims alleged by the Morrises, in addition to the negligence claims based on defective design, defective manufacture, inadequate or nonexistent warnings, and others, the Morrises claimed the Appellees were strictly liable under a products liability theory.

¶24. As to the foreseeability of the defect, one of the Morrises' expert witnesses, Steve Shephard, whose qualifications include a Ph.D. in mechanical engineering, submitted a sworn affidavit by which he stated that he studied all relevant documents and pleadings. According to Shephard's expert opinion, the Morrises' car contained a defect that proximately caused the fire that spread to the Morrises' home. Shephard further stated that the same defect in other Ford, Lincoln, and Mercury cars caused fires in numerous instances from 1992 to 1999. Shephard alleged that the Appellees had actual knowledge of the defect due to the frequent reporting to them of occurrence of fires, yet did nothing to correct the problem. Shephard even alleged that the Appellees knew the danger the defect created and actually concealed that knowledge from federal regulators.

¶25. As to the admissibility of Shephard's affidavit, Texas Instruments did submit a motion to strike said affidavit wherein TI advanced several arguments why Shephard's affidavit should be quashed. These included an apparent lack of a resume or other list of Shephard's qualifications, a lack of the required attachments of documents to which Shephard referred, a lack an explicit statement of personal knowledge,

as well as many others. While it is arguable, given the facts surrounding the affidavit, whether or not TI's motion to strike should have been granted, in making the determination to grant summary judgment, the lower court stated that it actually considered the affidavit of Shephard but found, without further explanation, that it "d[id] not contain any testimony that would be admissible evidence at trial." Furthermore, the trial court went on to state that summary judgment was proper even without consideration, and eventual granting, of TI's aforementioned motion. In sum, I cannot agree with the trial court's determination of the admissibility of the evidence contained in Shephard's affidavit.

¶26. While the burden of proof of emotional damages is high, it is my contention that under either standard promulgated by our supreme court, there exists a genuine issue of material fact for ultimate jury resolution that requires us to reverse the circuit court's decision to grant summary judgment in the Appellee's favor and remand the matter to the circuit court for a trial on the merits. Because the majority affirms the circuit court's decision, I respectfully dissent.

MYERS, P.J., CHANDLER AND BARNES, JJ., JOIN THIS OPINION.